

<https://helda.helsinki.fi>

Competition law perspective on geo-blocking in non-licensed territory

Shekera, Victor

2018-10-01

Shekera , V 2018 , ' Competition law perspective on geo-blocking in non-licensed territory ' ,
Europarättslig tidskrift , vol. 21 , no. 3 , pp. 405-416 . <
<http://www.ert.se/Authors/Author/2509> >

<http://hdl.handle.net/10138/300151>

unspecified
publishedVersion

Downloaded from Helda, University of Helsinki institutional repository.

This is an electronic reprint of the original article.

This reprint may differ from the original in pagination and typographic detail.

Please cite the original version.

COMPETITION LAW PERSPECTIVE ON GEO-BLOCKING IN NON- LICENSED TERRITORY

Victor Shekera*

1. INTRODUCTION

The internet has paved the way for significant development of e-commerce.¹ The internet, at least in theory, has made it possible to provide access to digital content and distribute it worldwide.² Nonetheless in reality, online distribution of digital content, such as music and movies, is restricted territorially by legal and technical means.³ Legal means in the form of copyright protection grants the owner of intellectual property rights the possibility to preclude others from copying or in any other way re-producing and commercially exploiting copyrighted material without prior authorization. Technical means takes the form of technologically executed restrictions implemented in order to secure protection of the legitimate rights of copyright owners, by technically restricting access to protected content on a territorial basis. An example of technical restriction is geo-blocking.

Geo-blocking is a fairly known phenomenon and is often cited as the main obstacle on the way to achieving a digital single market.⁴ Geo-blocking is a practice whereby a consumer physically located in one Member State is technically precluded from accessing digital content available in another Member State or the territory to which the right holder has licensed its copyrighted con-

* Doctoral Researcher, Faculty of Law, University of Helsinki. E-mail: victor.shekera@helsinki.fi. Many thanks for language review to Christopher Goddard.

¹ Report from the Commission to the Council and the European Parliament: Final report on E-Commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017 paras 3, 41.

² Alpana Roy and Althaf Marsoof, 'Geo-blocking, VPNs and injunctions' (2017) 39(11) European Intellectual Property Review 671, 672.

³ *ibid.*

⁴ Alpana Roy and Althaf Marsoof, 'Geo-blocking, VPNs and injunctions' (2017) 39(11) European Intellectual Property Review 672–674.

tent.⁵ In most cases,⁶ geo-blocking occurs through a contractual arrangement, where a copyright owner imposes an obligation on an online content distributor to geo-block. This technical restriction facilitates compliance by content distributors with the licensing agreement. Accordingly, a content distributor is contractually restricted, in other words, must not provide digital content outside the designated territory. An IP address is often used to determine a consumer's geographic location. Consequently, the consumer is either precluded from accessing the service or re-directed to a local version of the service.

This article discusses whether imposition of a geo-blocking restriction by copyright owners in licensing agreements unduly restricts competition between online content distributors in non-licensed territory, especially in cases where dissemination of digital content is already precluded by copyright law. The article proceeds as follows. Starting with a discussion of geo-blocking from the perspective of policy clashes – that is, clashes between fundamental freedom, competition law and copyright law – it then turns to competition law analysis of absolute territorial protection, that is, restrictions of active and passive sales. The article further distinguishes online content distribution from distribution of tangible goods by reference to CJEU case law before moving on to discuss the distinctive nature of digital content distribution and the inapplicability of the exhaustion of rights principle. Next, discussion of the restriction on competition in non-licensed territories for online content distributors leads to the conclusion, with a finding that geo-blocking does not restrict competition in non-licensed territories except in cases where copyright protection is used to facilitate absolute territorial protection or where the copyright owner exploits the market by extracting the highest possible remuneration due to market segregation.

2. GEO-BLOCKING AS A COMPETITION LAW RESTRICTION

In order to consider geo-blocking as a competition law restriction, it must be placed in the broader Union context.⁷ Since distribution of digital content involves three areas of law – fundamental freedom (freedom to provide ser-

⁵ Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 613–615.

⁶ Except in cases of statutory provisions of national laws of Member States. Michael F. Martin, *Natural Monopolies in Antitrust, Patent, and Copyright Law: The Essential Facilities, Reverse Doctrine of Equivalents, and Originality Doctrines as Triggers for a Compulsory Licensing Remedy* (2006) 24–25 <<http://ssrn.com/abstract=1123575>> accessed on 30 January 2018.

⁷ Alpana Roy and Althaf Marsoof, 'Geo-blocking, VPNs and injunctions' (2017) 39(11) European Intellectual Property Review 672–674.

vices), competition law and copyright law – it must be viewed from several perspectives.

From the freedom of movement perspective, geo-blocking by its very nature partitions the internal market along national or regional lines.⁸ It discriminates between consumers based on the location of their IP address and either deprives them of the service or grants them access to content. Consequently, geo-blocking recreates borders inside the European Union, thus standing directly against the aim of market integration.⁹

From the competition law perspective, geo-blocking allegedly harms the internal market since it precludes effective competition between undertakings from other Member States.¹⁰ In its absence, online content distributors from various Member States could compete on price, quality and diversity, while consumers would have an opportunity to purchase digital content or services from other Member States.¹¹ This in turn would facilitate more trade between Member States and increased competition on the merits between distributors.¹² However, any allegation of competition harm must be considered closely. The competition case-law of the CJEU has established that absolute territorial protection is prohibited under Article 101 TFEU, since it restricts cross-border trade and eliminates competition between undertakings from other Member States.¹³ *Open exclusivity* agreements usually do not violate Article 101 TFEU, unless restrictions on passive sales are imposed.¹⁴ In *exclusive licensing* agree-

⁸ Judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08, EU:C:2011:631; Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 613–615.

⁹ Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 613–615; E Sabrina, 'The battle against geo-blocking: the consumer strikes back' (2016) 15(1) Richmond Journal of Global Law and Business Summer 1–20.

¹⁰ E Sabrina, 'The battle against geo-blocking: the consumer strikes back' (2016) 15(1) Richmond Journal of Global Law and Business Summer 1–20.

¹¹ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/02, para 31; Jordi Gual and others, 'Report by the EAGCP. An Economic Approach to Article 82' (2005) Munich Discussion Paper No. 26, Department of Economics University of Munich 3 <http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf> accessed 07 February 2018; Josef Drexler, 'Real Knowledge is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases', 09-15 Max Plank Institute for Intellectual Property, Competition and Tax Law Research Paper Series 3–4, 32, 33 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517757 accessed 30 January 2018.

¹² Doris Hildebrand, *The Role of Economic Analysis in EU Competition Law: The European School* (Kluwer Law International 2009) 2.

¹³ Pablo I. Colomo, 'The Commission Investigation into Pay TV Services: Open Questions' (2014) ECL 531, 532.

¹⁴ *ibid*; Commission Regulation 316/2014 of 21 March 2014 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Technology

ments, imposition of restrictions on *active sales* is warranted.¹⁵ However, agreements which contain restrictions on *passive sales of tangible goods* are considered as *hard-core* restrictions.¹⁶ In cases where copyright-protected materials are involved and where no additional restrictions are imposed, products could be sold in other Member States or reimported by virtue of the principle of *exhaustion of rights*.¹⁷

The principle of *exhaustion of rights* is important because copyright law is structurally developed as a national system of protection.¹⁸ It is rooted in widely recognized principle of territoriality, which means that intellectual property right owners can enforce their rights within the territory of Member State which granted the protection.¹⁹ However, by asserting rights under copyright law, intellectual property right owners would be able to preclude smooth circulation of copyrighted materials throughout the union. Therefore, the principle of *exhaustion of rights* is used to reconcile the two, i.e. freedom of movement and protection of legitimate intellectual property rights.²⁰ Once goods are placed on the market, the copyright holder cannot stop the circulation of copyrighted goods within the EU.²¹ By putting goods on the market, the owner 'exhausts' his rights.²² However, the principle of *exhaustion of rights* has so far been used for traditional (tangible) goods. The relevant question is whether the same interpretation could be applied to digital content distribution. By applying the same analogy, once digital content is put online in one Member State, the owner would exhaust his rights EU-wide.

Transfer Agreements Article 4(2)(b) 2014 OJ (L 93); Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 600; Judgment of 8 June 1982, *Nungesser v Commission*, C-258/78, EU:C:1982:211, paragraphs 56–58.

¹⁵ Paul Craig, Grainne de Burca, *EU Law: text, cases and materials* (5th edn, OUP 2015) 1037–1038; Judgment of 8 June 1982, *Nungesser v Commission*, C-258/78, EU:C:1982:211, paragraphs 56–58.

¹⁶ Commission Regulation 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, Article 4(b)(i) 2010 OJ (L 102) 1, 5.

¹⁷ Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 600.

¹⁸ Berne Convention for the Protection of Literary and Artistic Works, last amended 28 September 1979.

¹⁹ *ibid.*

²⁰ Judgment of 8 June 1971, *Deutsche Grammophon v Metro SB*, C-78/70, EU:C:1971:59. See also Jaime Espantaleon, 'Exhaustion light in European television' (2010) European Intellectual Property Review 4–6.

²¹ Judgment of 8 June 1971, *Deutsche Grammophon v Metro SB*, C-78/70, EU:C:1971:59.

²² Article 4 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

The ECJ was faced with this question in *Coditel v Ciné Vog Films*.²³ The outcome of the case made it clear that the analogy is not conclusive and *exhaustion of rights* applies *only* to physical dissemination of goods.²⁴ Inapplicability of the exhaustion principle is further endorsed by the Commission's intervention and support in the case.²⁵ In the *UsedSoft*²⁶ case, where distribution of software occurred online, the exhaustion principle clashed with the *InfoSoc Directive*.²⁷ In order for the exhaustion principle to apply, the initial seller had to make sure the software was no longer used on his system.²⁸

As can be seen from the above, dissemination of digital content is treated quite differently from dissemination of tangible goods.²⁹ Moreover, dissemination of copyrighted material over the internet, such as music or video streaming, can fall exclusively under the Member State's copyright law provisions. The exercise of copyright protection in online content distribution restricts the use of fundamental freedoms, such as freedom of movement of services. On the contrary, an online content distributor who provides access to digital content in non-licensed territory would normally be violating a licensing agreement. As such it is not clear whether relying on fundamental freedom would excuse the licensee from copyright law infringement.³⁰ In that case, the relevant question is whether inclusion of a geo-blocking restriction in the online distribution agreement makes any difference in determining a competition law infringement, since restriction is already warranted under copyright law provisions.

2.1 absolute territorial protection as competition law infringement and possible justifications

As noted above, absolute territorial protection is prohibited under 101 TFEU. As such, imposition of geo-blocking restrictions in licensing agreements may

²³ Judgment of 6 October 1982, *Coditel v Ciné-Vog Films*, C-262/81, EU:C:1982:334.

²⁴ Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167 (InfoSoc Directive).

²⁵ Judgment of 3 July 2012, *UsedSoft*, C-128/11, EU:C:2012:407.

²⁶ *ibid.*

²⁷ Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167 (InfoSoc Directive); Andrew Murray, *Information Technology Law: The Law and Society* (3rd edn, OUP 2016) 219–232, 243; European Commission, 'Information Society' <<https://ec.europa.eu/jrc/en/science-area/information-society>> accessed 6 February 2018.

²⁸ Giuseppe Mazziotti, 'Is geo-blocking a real cause for concern in Europe?' (2016) *European Intellectual Property Review* 367–369; Judgment of 3 July 2012, *UsedSoft*, C-128/11, EU:C:2012:407.

²⁹ Judgment of 6 October 1982, *Coditel v Ciné-Vog Films*, C-262/81, EU:C:1982:334.

³⁰ Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 *Michigan State International Law Review* 595, 618.

under certain conditions be considered as restrictive of competition.³¹ For example, granting an exclusive license to an online content distributor in a particular territory may in practice create an effect similar to absolute territorial protection. Since a single distributor is assigned to a particular territory, this in turn precludes other distributors from selling to the allocated territory as they, in contrast, would be violating an exclusive agreement. The Commission's main concern in such restrictive agreements is whether a geo-blocking requirement restricts not only *active sales* but also *passive sales* to non-licensed territories.³² If so, a restriction might be capable of violating competition law by *object*.³³

Nevertheless, restrictions in exclusive licensing agreements as noted above may be justified, especially where a market or industry such as the movie industry – for example, dubbing and translation – requires it.³⁴ Since the European Union is highly heterogeneous culturally and linguistically,³⁵ dubbing plays an essential part of cinematography in several large Member States, such as Germany, Italy and France.³⁶ It is an essential part of funding for the industry as it helps local productions to adopt and localize foreign movies.³⁷ Nonetheless, in cases where an exclusive agreement exemption facilitates excessive returns and this situation lasts for a long period, the arrangement would violate competition law.³⁸ Furthermore, imposition of additional restrictions similar to *tangible goods*, such as limiting sales of decoders, would go beyond necessary protection of the subject matter of legitimate rights, since it facilitates absolute territorial protection.³⁹

³¹ Myles Jelf, 'Intellectual Property Rights and Article 102' (EU Competition Law IBC Summer School, Cambridge, United Kingdom, August 2011).

³² European Commission, Competition DG, *Cross-border access to pay-TV*, Case AT.40023, Paramount Commitments, paras 1, 6.

³³ Consolidated version of the Treaty on the Functioning of the European Union Article 101 (1); Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined cases C-403/08 and C-429/08, EU:C:2011:631.

³⁴ Communication from the Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ 2009, C45/7 para 31.

³⁵ Judgment of 6 October 1982, *Coditel v Ciné-Vog Films*, C-262/81, EU:C:1982:334, paragraph 15.

³⁶ Giuseppe Mazziotti, 'Is geo-blocking a real cause for concern in Europe?' (2016) European Intellectual Property Review 369–371.

³⁷ Brigitte Lindner, 'Breaking down national silos: farewell to geo-blocking in Europe? What does it mean for the audio-visual industry?' (2015) Intellectual Property Magazine 19, 20.

³⁸ Judgment of 6 October 1982, *Coditel v Ciné-Vog Films*, C-262/81, EU:C:1982:334, paragraphs 16–20.

³⁹ Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, paragraphs 141, 142.

3. DISTINCTIVE APPROACH IN ONLINE CONTENT DISTRIBUTION AND COMPETITION LAW RESTRICTION BY OBJECT

As discussed above, the principle of exhaustion of rights does not apply to online content distribution.⁴⁰ Moreover, the *country of origin* principle, similar to satellite communication to the public, is not applicable either.⁴¹ This can be illustrated by reference to the case-law: in *Football Association Premier League v. QC Leisure* communication (dissemination) to the public was arranged via satellite and thus required only a license in the country from which the transmission originated.⁴² It did not require a broadcaster to have licenses in the target Member States.⁴³ Besides, fundamental freedom – that is, free movement of services – precluded the use of national law.⁴⁴

In contrast to satellite communication to the public, online content distributors are not able to compete with other online distributors outside the licensed territory.⁴⁵ This is because providing access to content outside the licensed territory would in principle violate the licensing agreement.⁴⁶ Furthermore, copyright law may not necessarily require a geo-blocking restriction. Prudent distributors, wishing to avoid violating a licensing agreement, would use technological means in the shape of geo-blocking to safeguard themselves from infringements. As a result, they would have to decline a purchase to a consumer from a non-licensed territory. Under these circumstances, it is quite hard to establish a competition law restriction by *object*, when the geo-blocking

⁴⁰ Judgment of 6 October 1982, *Coditel v Ciné-Vog Films*, C-262/81, EU:C:1982:334.

⁴¹ Article 1(2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ L 248, 6.10.1993, 15–21.

⁴² Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, paragraph 14.

⁴³ *ibid.*

⁴⁴ *ibid.* 72, 117, 125.

⁴⁵ Jeremy Roberts, 'EU digital single market strategy: what it means for film, TV and sports media rights' 2015 26(6) Entertainment Law Review 196–198; Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, paragraphs 14, 197; Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 602; See also Tobias Lutzi, 'Internet cases in EU private international law – developing a coherent approach' (2017) 66(3) International & Comparative Law Quarterly 691, 693, 696.

⁴⁶ Judgment of 13 October 2011, *Airfield and Canal Digitaal*, Joined Cases C-431/09, C-432/09, EU:C:2011:648, paragraph 72; Jeremy Roberts, 'EU digital single market strategy: what it means for film, TV and sports media rights' 2015 26(6) Entertainment Law Review 198; See also Bill Batchelor, 'Antitrust challenges to cross-border content licensing: the European Commission investigations of collecting societies and iTunes' (2007) 13(8) Computer and Telecommunications Law Review 221–222.

requirement does not restrict competition beyond what is necessary to protect rights under copyright law.⁴⁷

Although the geo-blocking requirement could be restrictive of competition when it precludes competition between distributors,⁴⁸ nonetheless the relevant question is whether online content distributors are even allowed to provide access to content to non-licensed territory – that is, passive sales – without infringing the license.⁴⁹ If distributors do not have a license in non-licensed territory, they do not compete there in the first place.⁵⁰ In contrast, a distributor who will be competing with other distributors in non-licensed territory – that is, actively selling there – will be infringing the licensing agreement.⁵¹ Consequently, a geo-blocking restriction does not restrict competition in non-licensed territory.

Although – depending on the licensing agreement – online content distributors may not necessarily be precluded from selling to unsolicited consumers (*passive sales*), this does not mean that distributors can actively engage in sales on a full-scale basis in non-licensed territory. This is because selling actively would mean communication to a *new public*, and as such would require prior authorization or license to sell to the new public.⁵²

Nonetheless, in order to establish a copyright infringement, some sort of communication to the public in the absence of a license must be evident. For example, this could be established by the following: whenever the online content distributor provides access to copyrighted content outside the licensed territory, he must register users and monitor use of content. This could be used to establish an infringement. The online content distributor usually cannot (actively) provide content outside licensed territory; otherwise he will be vio-

⁴⁷ Judgment of 6 October 2009, *GlaxoSmithKline Services and Others v Commission and Others*, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58; Paul Henty, 'Let's take this online: antitrust enforcement in e-commerce' (2017) 6(2) Compliance & Risk 4–5.

⁴⁸ European Commission, Competition DG, *Cross-border access to pay-TV*, Case AT.40023, Paramount Commitments, paras 1, 6; Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 597, 609.

⁴⁹ European Commission, Competition DG, *Cross-border access to pay-TV*, Case AT.40023, Paramount Commitments, paras 1, 6.

⁵⁰ Pablo I. Colomo, 'Article 101 TFEU and Market Integration' (2016) 12 Journal of Competition Law & Economics, Working Paper No. 07/2016, 3–4, 22–24; European Commission, Competition DG, *Cross-border access to pay-TV*, Case AT.40023, Paramount Commitments, paras 1, 6.

⁵¹ Stavroula Karapapa, 'The requirement for a "new public" in EU copyright law' (2017) 42(1) European Law Review 65, 67–68, 70.

⁵² Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, 197; Judgment of 6 October 1982, *Coditel v Ciné-Vog Films*, C-262/81, EU:C:1982:334, paragraphs 13, 14; Stavroula Karapapa, 'The requirement for a "new public" in EU copyright law' (2017) 42(1) European Law Review 65, 67–68, 70.

lating the licensing agreement. However, application of copyright law does not automatically guarantee that competition law is not breached. Establishing a breach will depend on the nature of the agreement and its provisions.⁵³ This is especially relevant where the online content provider could provide sales to non-licensed territories by avoiding violation of the licensing agreement.

4. COMPETITION IN NON-LICENSED TERRITORIES UNDER THE THREAT OF COPYRIGHT INFRINGEMENT AND THE GEO-BLOCKING REQUIREMENT

Online content distributors can potentially compete in non-licensed areas, although under the threat of infringing the copyright. In cases where it is not clear whether a copyright is infringed by passive sales, the very presence of geo-blocking removes the possibility for a distributor to compete in a non-licensed area. If a copyright owner believes that his rights have been violated, the Commission expects the copyright owner to initiate legal proceedings in order to put a stop to the infringement. This approach might open cross-border competition between distributors.⁵⁴ However, this reasoning is not consistent with overall competition law policy.

⁵³ Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries. Economic versus Legal Concepts in Pursuit of (Consumer) Welfare* (Hart Publishing 2012) 115–116; Louis Kaplow, 'Why (Ever) Define Markets?' (2010) 124 *Harvard Law Review* 437–517; Louis Kaplow, 'Market Definition: Impossible and Counterproductive' (2013) 79(1) *Antitrust Law Journal* 361–379 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2402953> accessed 30 January 2018; Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, paragraph 123; Commission Decision of 26.07.2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40023 – Cross-border access to Pay-TV); Ioannis Lianos, 'Categorical Thinking in Competition Law and the Effects-Based Approach in Article 82 EC in Ariel Ezrachi (ed) *Article 82 EC Reflections on Its Recent Evolution* (Hart Publishing 2009) 21; Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and US* (Hart Publishing 2012) 154; Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries. Economic versus Legal Concepts in Pursuit of (Consumer) Welfare* (Hart Publishing 2012) 115–116; Josef Drexler, 'Anticompetitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market' (2012) 8(3) *Journal for Competition Law & Economics* paras 507, 519; Josef Drexler, 'Real Knowledge is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases', 09–15 Max Plank Institute for Intellectual Property, Competition and Tax Law Research Paper 4–5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517757> accessed 30 January 2018. See also Marcus Glader, *Innovation markets and competition analysis: EU competition law and US antitrust law* (Edward Elgar 2006).

⁵⁴ Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected

The Commission suggestion to litigate over imposition of restrictions in a contract is problematic since copyright litigation is quite expensive. This route of resolution significantly increases the costs for copyright. Those copyright owners who do not wish to proceed to expensive litigation would have to tolerate some infringements. This approach in competition policy is not justified. Moreover, the geo-blocking problem is not solved by litigation, since after the dispute is settled geo-blocking might still be required in order to stop infringement. When a restriction based on intellectual property right protection is invoked under competition law, protection must not go beyond what is necessary to protect the subject matter of intellectual property rights.⁵⁵ If it is not justified, intellectual property rights are not warranted.⁵⁶ No comparable approach is available in a geo-blocking situation.⁵⁷

Where protection of subject matter goes beyond necessary protection, especially in cases where the copyright owner extracts the highest possible remuneration or creates an absolute territorial protection based on copyright law, justification may not be warranted.⁵⁸ For example, the restriction on freedom of movement of decoders in *Football Association Premier League v. QC Leisure* was too restrictive.⁵⁹ It did not protect the subject matter and could have been achieved by less restrictive means. As such, application of copyright does not ultimately guarantee immunity from competition law.

As can be seen from the above, geo-blocking does not usually restrict competition. However, in cases where geo-blocking facilitates absolute territorial protection, it would be restrictive of competition. Therefore, when it is established that absolute territorial protection is created based on a licensing agreement and free movement precludes the use of copyright, then it can also be established that competition law is infringed. When this is the case, the agreement is restrictive of competition and the distributor can in principle provide services to a non-licensed territory.

Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 597, 609.

⁵⁵ Judgment of 6 April 1995, *RTE and ITP v Commission*, Joined cases C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 46. See opposing views in Steven Anderman and Hedvig Schmidt, *EU Competition Law and Intellectual Property Rights* (2nd edn, OUP 2011) 14; Myles Jelf, 'Intellectual Property Rights and Article 102' (EU Competition Law IBC Summer School, Cambridge, United Kingdom, August 2011).

⁵⁶ Myles Jelf, 'Intellectual Property Rights and Article 102' (EU Competition Law IBC Summer School, Cambridge, United Kingdom, August 2011).

⁵⁷ Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 609–610.

⁵⁸ Judgment of 6 April 1995, *RTE and ITP v Commission*, Joined cases C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 46.

⁵⁹ Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, paragraphs 141, 142.

Although fundamental freedom will preclude application of copyright, and as such copyright infringement would not occur, a distributor may still be discouraged from providing services since he may not want to establish consumer support in the target country. Since the battle for legal superiority between competition law and intellectual property rights has been ongoing for a while, the Commission has tried to rectify the situation by proposing several legal instruments, that is, the Geo-blocking Regulation and the Portability Regulation.⁶⁰ As a result, geo-blocking requirements might at some point become restrictive. Nonetheless, the Geo-blocking Regulation excludes materials covered by intellectual property rights from its scope. This by no means grants permission to online distributors to provide copyrighted materials to non-licensed territory.⁶¹ At the same time, use of geo-blocking is not prevented.⁶² Moreover, the Geo-blocking Regulation includes a provision which stipulates that a review of intellectual property rights provision will be undertaken in the future.⁶³

5. CONCLUSIONS

Vertical agreements constitute a vital part of business and consumer life. They facilitate distribution of goods, services and content between producers/suppliers and consumers. The vast majority of vertical agreements do not violate competition law. However, restrictions in some agreements may flow from provisions from adjacent fields such as copyright law, and in certain cases restrictions may be capable of competition law infringements. Online content distributors who disseminate copyrighted materials might be precluded by licensing agreements from selling outside the licensed territory. The relevant discourse is whether imposition of a technical requirement – that is, geo-blocking – unlawfully restricts competition between distributors, since a fundamental freedom

⁶⁰ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (Text with EEA relevance) OJ L 60I, 2.3.2018, 1–15; Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (Text with EEA relevance) OJ L 168, 30.6.2017, 1–11.

⁶¹ Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 603.

⁶² *ibid.* 617–618.

⁶³ Article 9 of Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (Text with EEA relevance) OJ L 60I, 2.3.2018, 1–15.

– freedom to provide services – is restricted. The Commission’s main concern in these restrictive agreements is whether geo-blocking requirements, besides restricting *active sales* to non-licensed territories, also restrict *passive sales*, especially in cases where distributors are able to provide services to non-licensed territory without infringing the license. In these cases, geo-blocking provision precludes a distributor from even a possibility to compete in a non-licensed area.

Nevertheless, in most cases geo-blocking does not restrict competition, as online distributors do not compete in a non-licensed area in the first place, since they do not have a license there. If they were to compete in non-licensed territory, that is, to *actively* sell there, they would face the risk of copyright infringement, since such sales would constitute communication to a *new public*, which is different from satellite broadcasting.⁶⁴

Notwithstanding, applicability of copyright law protection would not automatically guarantee exemption from competition law scrutiny. If geo-blocking restriction facilitates creation of absolute territorial protection and undertakings use copyright law protection as a means to exploit price differences due to market segregation, the geo-blocking requirement is capable of becoming restrictive of competition.

⁶⁴ Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, paragraph 14.